THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 662/2022

In the matter between:

INTEGRITY FORENSIC SOLUTIONS CC **APPELLANT**

and

AMAJUBA DISTRICT MUNICIPALITY **RESPONDENT**

Neutral citation: *Integrity Forensic Solutions CC v Amajuba District Municipality* (662/2022) [2023] ZASCA 124 (28 September 2023)

Coram: PONNAN, MABINDLA-BOQWANA and GOOSEN JJA and WINDELL and KEIGHTLEY AJJA

Heard: 7 September 2023

Delivered: 28 September 2023

Summary: Contract – whether proved that contracting parties reached consensus on terms of agreement – narrow factual issue determined at trial – appeal court confirming factual findings – order in terms of s 16(1)(*b*) of Superior Courts Act 10 of 2013 for special leave – Supreme Court of Appeal to satisfy itself that threshold for special leave met as jurisdictional requirement – appeal struck off the roll.

ORDER

On appeal from: KwaZulu-Natal Division of the High Court, Pietermaritzburg (Koen, Poyo-Dlwati and Bezuidenhout JJ, sitting as court of appeal):

The appeal is struck off the roll with costs, including the costs of two counsel.

JUDGMENT

Goosen JA (Ponnan and Mabindla-Boqwana JJA and Windell and Keightley AJJA concurring)

[1] This case, not without irony, concerns an agreement to provide litigation support services in relation to irregularities in a public institution, in circumstances where the procurement of those services did not follow prescribed procedures. The primary question, however, was whether a valid and binding agreement was concluded.

[2] Integrity Financial Services CC (IFS) was contracted by Amajuba District Municipality (Amajuba) to investigate Amajuba's procurement processes (the forensic investigation). The agreement, about which there was no dispute, originated as follows: During 2013, Amajuba requested its auditors, Thabani Zulu Incorporated (Thabani Zulu), to conduct an audit of its procurement processes. Thabani Zulu subcontracted this work to IFS. In 2014, Thabani Zulu produced a preliminary audit report, which identified a number of serious irregularities relating to supply chain procurement processes and unauthorised expenditure. Its findings implicated a number of persons, including officials in the employ of Amajuba. The findings were, however, preliminary. In order to facilitate the

recovery of misappropriated funds and disciplinary or criminal prosecution, further investigation was required.

[3] Thabani Zulu, however, was no longer available to undertake this work. Amajuba therefore procured the services of IFS directly. The then municipal manager of Amajuba, Mr Afrika, obtained authorization for a deviation from the procurement regulations in order to appoint IFS to undertake the further investigation. The forensic investigation agreement was concluded in August 2015. The principal service obligation on the part of IFS was to produce a forensic audit report relating to procurement and supply chain irregularities. It was agreed that IFS would charge at the rate of R1 195.00 per hour for its services, to a maximum amount of R1 242 800.00 exclusive of Value Added Tax.

[4] IFS submitted invoices for its work from time to time and was paid. It was common cause that it produced the report as required. The present dispute arose after the production of the audit report, which was delivered in August 2016. On 17 May 2018, IFS issued summons against Amajuba for payment of two claims. The first was for payment of R276 297.51, plus interest arising from the audit investigation agreement (the first claim). The second was for payment of three amounts totalling R754 557.15, plus interest (the second claim). The second claim arose from a further agreement, which it was alleged had been concluded on 25 August 2016. Its object was the provision of litigation support services to the National Prosecuting Authority (the NPA) and the Directorate of Priority Crimes (the DPC) on behalf of Amajuba. The first claim was settled. The second is the subject of the appeal.

[5] Amajuba pleaded that no agreement was concluded. In the alternative, it denied that Mr Afrika had the requisite authority to conclude the alleged agreement. In a further alternative, albeit only generally pleaded, Amajuba denied

the lawfulness of the alleged agreement. In its replication, IFS raised an estoppel in relation to the lack of authority defence.

[6] The issue before the trial court was 'whether a valid agreement had been concluded between the parties which was capable of contractual enforcement in respect of the second claim'. IFS presented the evidence of Mr Afrika and its principal member, Mr Saunders, whom it alleged had concluded the agreement. Mr Zwane, Amajuba's municipal manager, testified on its behalf.

[7] The trial court found that no valid agreement for the provision of litigation support had come into being. It therefore dismissed IFS's claim with costs. IFS prosecuted an appeal to the full court of the KwaZulu-Natal Division of the High Court, Pietermaritzburg. The full court dismissed the appeal. It found that no valid and binding agreement with terms sufficiently certain to give rise to a binding obligation in law, was proved. The appeal is before us pursuant to special leave granted on petition to this Court.

[8] This Court's appeal jurisdiction derives from s 16 of the Superior Courts Act 10 of 2013 (the Act). In *Absa Bank v Snyman*, Brand JA said:

'…this court only has jurisdiction to hear an appeal against an order of a high court if leave to do so had been granted by that court, or in the event of a refusal by that court, by this court.'[1]

[9] Where the judgment is that of a high court on appeal to it, special leave to appeal must be obtained from this Court, in terms of s 16(1)(*b*) of the Act. In that event, in addition to the ordinary requirement of reasonable prospects, it must be shown that there are special circumstances which merit a further appeal. These

[1] *Absa Bank Limited v Snyman* [2015] ZASCA 67; 2015 (4) SA 329 (SCA); [2015] 3 All SA 1 (SCA) para 10. In *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd* [2015] ZASCA 25; 2015 (4) SA 34 (SCA); [2015] 2 All SA 322 (SCA) para 13, Brand JA described the order granting leave to appeal as a 'jurisdictional fact', in the absence of which the court does not have the jurisdiction to entertain the dispute. See also *DRDGOLD Limited and Another v Nkala and Others* [2023] ZASCA 9; 2023 (3) SA 461 (SCA) para 17 and 18.

would include a substantial point of law; or that the matter is of considerable importance to the parties, or of great public importance; or, where the prospects of success are so strong that a refusal of leave would probably result in a manifest denial of justice.[2]

[10] The granting of special leave to appeal on petition to the President of this Court is not dispositive of the question whether special circumstances exist to engage this Court's jurisdiction. That question is one ultimately for the court hearing the appeal.[3]

[11] IFS's case was that an agreement was concluded between it and Amajuba to provide litigation support in the prosecution of persons identified in the audit report. Its pleaded case was that the agreement was a tripartite one in as much as it also involved the DPC. It was alleged to be partly oral and partly written. Before this Court, counsel for IFS conceded that the agreement conferred no rights upon, nor imposed any obligations on the DPC and was therefore not in fact a tripartite one. Counsel also conceded that the letter of mandate, said to reflect the written terms of the alleged agreement, was framed in the broadest of terms. It did not indicate express agreement regarding the scope of the work to be performed.

[12] Mr Afrika stated that it was envisaged that the parties would engage with one another and reach agreement on the costs of the litigation support services. This would allow Amajuba to make provision for such costs. As far as the written mandate was concerned, he explained that this indicated the scope of work to be undertaken, but that the parties would engage in further discussion when they

[2] *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 548 (A) at 564H-565E; *National Union of Metalworkers of South Africa and Others v Fry's Metals (Pty) Ltd* 2005 (5) SA 433 (SCA) para 42-43.
[3] *National Union of Mineworkers and Another v Samancor Limited (Tubatse Ferrochrome) and Others* [2011] ZASCA 74; [2011] 11 BLLR 1041 (SCA); (2011) 32 ILJ 1618 (SCA) para 14-15; *Stu Davidson & Sons (Pty) Ltd v East Cape Motors (Pty) Ltd* [2018] ZASCA 26 paras 3 and 18.

were ready to commence the work. It is important to emphasise that Mr Afrika was the person who represented Amajuba in the conclusion of the alleged agreement, and that his evidence was presented by IFS to support their pleaded case. As far as the lawfulness of the contract was concerned, Mr Afrika stated that the litigation support agreement was an 'extension' of the forensic investigation agreement and was, in his view, covered by the initial deviation from the procurement process. The costs and duration of the services were matters to be dealt with when the support services were to be provided.

[13] Mr Saunders believed that agreement had been reached on the essential terms. He had agreed to continue providing services at the same rate IFS had previously charged. He conceded that the work to be performed would be that which was required by the DPC or the NPA. He anticipated the ongoing involvement by Mr Afrika in the execution of the contract. His evidence was that once Mr Afrika had left Amajuba, he tried in vain to find someone from Amajuba who would step in to represent it .

[14] The undisputed evidence of Mr Zwane was that no letter of instruction or order was issued by Amajuba for the work performed by IFS. There was no authorisation for a deviation from the procurement requirements and no budget provision was made for such work. On the facts, there was no indication of the duration of the contract. The cumulative effect of the evidence of Mr Afrika and Mr Saunders was tantamount to evidence of an unenforceable agreement to agree.[4] The trial court found that the evidence did not prove that a valid and binding agreement had been concluded. The full court confirmed the finding. Its conclusion was that there was no agreement regarding the scope of specific

[4] *Shepherd Real Estate Investments (Pty) Ltd v Roux Le Roux Motors CC* [2019] ZASCA 178; 2020 (2) SA 419 (SCA).

litigation support to be provided; no price was agreed for the provision of the services and the duration of the agreement was not specified. There was accordingly no agreement which was capable of enforcement.

[15] This takes me back to the question concerning special leave to appeal. On the evidence presented before the trial court, its finding that no contract came into existence, cannot be faulted. It follows that the minimum requirement for the granting of special leave, namely, that there should at least be a reasonable prospect of success on appeal, is not met. In the notice of appeal, IFS sought to invoke s 172 of the Constitution. The contention was that if it was found that an agreement was concluded, there was no dispute that it was concluded contrary to procurement requirements stipulated by s 217 of the Constitution. For this reason, the court would be required, when setting it aside, to grant IFS just and equitable relief. This would, it was submitted, compensate IFS for the work it had actually performed.

[16] These aspects do not arise. On the facts, no contract was proved. The question of an equitable remedy, even assuming that this issue was properly raised on the pleadings, could only arise if there was a contract to set aside. Counsel for IFS conceded this. He accepted, in effect, that it is only in relation to these questions that it might be said that the appeal raises matters of importance or significance. Accordingly, no special circumstances exist which would warrant a further appeal to this Court. It follows that the threshold for special leave to appeal was not met.

[17] In the circumstances, the appeal must be struck from the roll. Counsel for Amajuba sought the costs of two counsel on the basis that special leave was initially granted by the two judges of this court who considered the petition and it was therefore necessary to prepare upon the full ambit of issues, including the

constitutional questions which might arise. Counsel for IFS did not argue to the contrary.

[18] In the result, the appeal is struck off the roll with costs, including the costs of two counsel.

G GOOSEN
JUDGE OF APPEAL

Appearances

For the appellant:	I Veerasamy
Instructed by:	Norton Rose Fulbright South Africa Inc, Durban
	Phatshoane Henney Attorneys, Bloemfontein
For the respondent:	L E Combrink SC (with J P Pretorius)
Instructed by:	DBM Attorneys, Newcastle
	Lovius Block Inc, Bloemfontein.